Wong Choon For v Lim Chee Hooi & Ors

HIGH COURT (TEMERLOH) — CIVIL APPEAL NO 11–36 OF 2000
RAMLY ALI JC
19 OCTOBER 2001

Civil Procedure *— Affidavits — Defective affidavit — Affidavit affirmed in Bahasa Malaysia — Whether deponent illiterate in Bahasa Malaysia — Meaning of 'illiterate' — Whether Form 71(c) of Subordinate Courts Rules 1980 was proper form to use — Whether requirements under O 25 r 24 of Subordinate Courts Rules 1980 complied with*

Civil Procedure *— Affidavits — Defective affidavit — Whether jurat to affidavit was signed by commissioner for oaths*

Landlord and Tenant *— Controlled premises — Legislation — Repeal of Control of Rent Act 1966 — Application by landlords for writ of distress for recovery of rent due — Whether rent due to landlords at the time of application for a writ of distress*

Landlord and Tenant *— Controlled premises — Legislation — Repeal of Control of Rent Act 1966 — Landlord's right to vacant possession of premises pursuant to s 8 of Control of Rent (Repeal) Act 1997 for non-payment of rentals by tenant — Whether right conferred upon landlord pursuant to s 8 of Control of Rent (Repeal) Act 1997 included right for writ of distress*

Words and Phrases *— Illiterate — Meaning of — Whether deponent of affidavit was illiterate — Affidavit affirmed in Bahasa Malaysia*

The appellant had rented a property in Bentong, Pahang ('the premises') since 1947 at a rental of RM58 per month. The premises were subject to the Control of Rent Act 1966 ('CRA'). In October 1999, the premises were sold by its owner ('TTM') to the respondents. TTM had written to the appellant to advise the latter to pay the future monthly rentals to the respondents. By a letter dated 1 October 1999, the first respondent ('LCH') gave notice to the appellant to vacate the premises on or before 31 December 1999 pursuant to s 11(1), (2) and (3)(a) of the Control of Rent (Repeal) Act 1997 ('the Act'). The appellant was further informed that if he continued to occupy the premises after 31 December 1999, the appellant had to pay rental of RM1,500 per month. The appellant denied having received both these letters. The appellant sent the monthly rental for November and December 1999 and January 2000 to TTM. On 3 December 1999, LCH sent another letter to the appellant ('the letter') requesting that the appellant vacate the premises on or before 31 December 1999. This was the first letter the appellant claimed to have received from LCH. Thereafter, the rentals for the months of February and March 2000 were paid to LCH. On 28 February 2000, the respondents applied for a writ of distress to be issued from the Bentong Magistrate's Court on the ground that the appellant had failed to pay the monthly rental to the premises for four

A months, that is RM58 each for November and December 1999 and RM1,500 each for January and February 2000. The writ of distress was issued and consequently, the court bailiff seized the appellant's movable properties in the premises. Thereafter, the appellant filed an application in the Bentong Magistrate's Court to set aside and cancel the writ of distress but when the application came up for hearing, B counsel for the respondents raised a preliminary objection to the effect that the appellant's affidavit in support of the application was defective as the jurat to the affidavit was not signed by a commissioner for oaths and the jurat failed to comply with O 25 r 22(7) and (8) of the Subordinate Courts Rules 1980 ('the SCR'). The learned magistrate C upheld the preliminary objection and rejected the appellant's affidavit in support. As the appellant's application was without any supporting affidavit, the magistrate dismissed the application. This was the appellant's appeal against the decision of the magistrate.

D **Held**, allowing the appellant's appeal:

(1) The jurat was signed by the appellant before a commissioner for oaths ('TKM') who acted as an interpreter at the same time. TKM had signed twice in the jurat, one above his rubber stamp as 'Jurubahasa Mahkamah Bersara (Tingkatan Tertinggi)' and E the other, inside his rubber stamp as a commissioner for oaths. As such, the appellant's affidavit was in accordance with the relevant requirement that the jurat be signed by a commissioner for oaths (see p 262H).

(2) The word 'illiterate' was not defined in the SCR. The ordinary meaning of the word 'illiterate' was 'unable to read', 'not knowing F how to read or write' or 'one who is unable to read'. It was not disputed that the appellant could not understand Bahasa Malaysia and in the context of the appellant's affidavit, it must mean that the appellant was unable to read, write or understand Bahasa Malaysia. Thus, the appellant was illiterate as far as Bahasa Malaysia was concerned. Therefore, the proper format to G be used was Form 71(c) as was done by the appellant and not Form 71(d) as suggested by the respondents' counsel. Since the appellant was an illiterate in Bahasa Malaysia, all the requirements under O 25 r 24 of the SCR must be complied with. In the instant case, the requirements had been complied with (see p 263E–I).

H

(3) Section 5(1) of the Distress Act 1951 provided that a writ of distress could only be issued for the recovery of rent due or payable to the landlord by a tenant for a period not exceeding 12 completed months of tenancy immediately preceding the date of the application. Hence, the main issue to determine was I whether there was rent due or payable or in arrears to the respondents at the time when they applied for a writ of distress (see p 265E, G).

(4) The appellant had sent the rentals for the months of November and December 1999 to TTM because, at that point in time, the appellant had no knowledge regarding the change of ownership of the premises. As such, the appellant was not in arrears as far as the rentals for November and December 1999 were concerned and the respondents could not use this issue to apply for a writ of distress against the appellant (see p 266E–F).

(5) Upon the repeal of the CRA, any tenancy between the landlord and a tenant shall be deemed to have ceased and the rental for the premises after the expiry of the transitional period that is, 31 December 1999 should be based on a fresh tenancy agreement between the parties. In the instant case, the new rental of RM1,500 per month with effect from January 2000 was unilaterally fixed by the respondents and the appellant had no knowledge about it. Thus, the appellant had never agreed to the new rental (see pp 267B–C, 268I–269A).

(6) In order to support a claim for increased rental or to justify the distress therefor, the respondents must show that the appellant had agreed to pay such increased rental. As the appellant had not agreed to pay the increased monthly rental of RM1,500, the respondents' claim that the appellant was in arrears in respect of the rentals for January and February 2000 must fail. Therefore, the respondents had failed to prove that the appellant's rentals were in arrears for four months as alleged by the respondents and on this ground alone, the writ of distress issued by the magistrate's court was irregular and improper and must be set aside (see p 269B, F–G).

(7) The landlord's right to vacant possession of the premises pursuant to s 8 of the Act for non-payment or arrears in payment of rentals by the tenant arose only in the event of non-payment or arrears in payment of rentals by the tenant during the transitional period, that is commencing on 1 September 1997 and ending on 31 December 1999. The same did not cover the non-payment or arrears in payment of rental beyond that period. The right conferred upon a landlord pursuant to s 8 of the Act did not include the right for a writ of distress. An action for vacant possession was different from an action for a writ of distress. For vacant possession, the tenant had to vacate the premises and thereafter hand over the premises to the landlord. A writ of distress, on the other hand, was addressed to the bailiff of the court directing him forthwith to destrain any movable property found on the premises or such part of the property as may be sufficient, when sold, to realize the amount of rent therein stated to be due to the applicant, together with such sum due to the applicant by way of costs and to the bailiff for his fees and expenses. Therefore, the respondents were not entitled to use s 8 of the Act to apply for the issuance of the writ of distress against the appellant (see pp 270F–271B).

(8) LCH's letter of 1 October 1999 should only be sent to the appellant upon the expiry of the transitional period but not before. In the instant case, the notice of 1 October 1999 was sent before the expiry of the transitional period and there was no proof that the notice was effectively served on the appellant or any of his authorized agents in accordance with the provisions of s 11(3) of the Act. Therefore, that notice was inappropriate and invalid (see p 271E–H).

(9) What the respondents should have done in the present circumstances was to exercise their rights as the landlords of the premises under s 11 of the Act upon the expiry of the transitional period. The respondents may then serve a notice to quit by giving the appellant a period of three months to vacate the premises and upon the appellant's failure to vacate the premises as requested, the respondents may sue for vacant possession and arrears of rental (see p 272A–B).

[Bahasa Malaysia summary

Perayu telah menyewa satu hartanah di Bentong, Pahang ('premis tersebut') sejak tahun 1947 dengan sewa RM58 sebulan. Premis tersebut tertakluk kepada Akta Kawalan Sewa 1966 ('AKS'). Pada bulan Oktober 1999, premis tersebut telah dijual oleh pemiliknya ('TTM') kepada responden-responden. TTM telah menulis kepada perayu untuk menasihatnya untuk membayar sewa bulanan masa hadapan kepada responden. Melalui sepucuk surat bertarikh 1 Oktober 1999, responden pertama ('LCH') telah memberikan notis kepada perayu untuk mengosongkan premis tersebut pada atau sebelum 31 Disember 1999 menurut s 11(1), (2) dan (3)(a) Akta Kawalan Sewa (Pemansuhan) 1997 ('Akta tersebut'). Perayu selanjutnya telah dimaklumkan bahawa jika beliau terus menetap di atas premis tersebut selepas 31 Disember 1999, perayu perlu membayar sewa RM1,500 sebulan. Perayu menafikn telah menerima kedua-dua surat tersebut. Perayu telah menghantar sewa bulanan untuk November dan Disember 1999 dan Januari 2000 kepada TTM. Pada 3 Disember 1999, LCH telah menghantar sepucuk surat lagi kepada perayu ('surat tersebut') meminta perayu mengosongkan premis tersebut pada atau sebelum 31 Disember 1999. Ini adalah surat pertama yang perayu katakan telah diterima daripada LCH. Oleh itu, sewa-sewa untuk bulan-bulan Februari dan Mac 2000 telah dibayar kepada LCH. Pada 28 Februari 2000, responden-responden telah memohon satu writ distres untuk dikeluarkan daripada Mahkamah Majistret Bentong atas alasan bahawa perayu telah gagal untuk membayar sewa bulanan untuk premis tersebut untuk empat bulan, iaitu RM58 masing-masing untuk November dan Disember 1999 dan RM1,500 masing-masing untuk Januari dan Februari 2000. Writ distres telah dikeluarkan dan akibatnya, bailif mahkamah telah

merampas harta alih perayu di atas premis tersebut. Selepas itu, perayu telah memfailkan satu permohonan di Mahkamah Majistret Bentong untuk mengetepi dan membatalkan writ distres tersebut tetapi apabila permohonan tersebut dikemukakan untuk dibicarakan, peguam bagi pihak responden telah menimbulkan satu bantahan awal bahawa afidavit sokongan permohonan adalah cacat kerana jurat kepada afidavit tersebut tidak ditandatangani oleh pesuruhjaya sumpah dan jurat tersebut gagal mematuhi A 25 k 22(7) dan (8) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'). Majistret yang arif mengekalkan bantahan awal tersebut dan menolak afidavit sokongan perayu. Memandangkan permohon perayu tiada apa-apa afidavit sokongan, majistret telah menolak permohonan tersebut. Ini adalah rayuan perayu terhadap keputusan majistret tersebut.

Diputuskan, membenarkan rayuan perayu:

(1) Jurat telah ditandatangani oleh perayu di hadapan pesuruhjaya sumpah ('TKM') yang bertindak sebagai jurubahasa pada masa yang sama. TKM telah menandatangani dua kali dalam jurat tersebut, satu di bahagian atas cap getah sebagai 'Jurubahasa Mahkamah Bersara (Tingkatan Tertinggi)' dan satu lagi, di bahagian dalam cap getah beliau sebagai pesuruhjaya sumpah. Oleh itu, afidavit perayu adalah mengikut keperluan yang relevan di mana jurat perlu ditandatangani oleh pesuruhjaya sumpah (lihat ms 262H).

(2) Perkataan 'buta huruf' (illiterate) tidak ditafsirkan dalam KMR. Maksud biasa perkataan 'buta huruf' adalah 'tidak boleh membaca', 'tidak tahu bagaimana untuk membaca atau menulis' atau 'seseorang yang tidak boleh membaca'. Ia tidak dipertikaikan bahawa perayu tidak memahami Bahasa Malaysia dan dalam konteks afidavit perayu, ia mestilah bermaksud bahawa perayu tidak boleh membaca, menulis atau memahami Bahasa Malaysia. Oleh itu, perayu adalah buta huruf setakat Bahasa Malaysia adalah berkenaan. Oleh demikian, format yang betul untuk digunakan adalah Borang 71(c) sebagaimana yang telah dilakukan oleh perayu dan bukan Borang 71(d) sebagaimana yang dicadangkan oleh peguam responden-responden. Memandangkan perayu seorang buta huruf dalam Bahasa Malaysia, semua keperluan di bawah A 25 k 24 KMR mestilah dipatuhi. Dalam kes ini, keperluan-keperluan tersebut telah dipatuhi (lihat ms 263E–I).

(3) Seksyen 5(1) Akta Distres 1951 memperuntukkan bahawa satu writ distres hanya boleh dikeluarkan untuk pengembalian semula sewa terhutang atau perlu dibayar kepada tuanpunya tanah oleh seorang penyewa untuk satu tempoh tidak lebih daripada 12 bulan penuh penyewaan serta-merta sebelum tarikh permohonan. Justeru itu, persoalan utama untuk ditentukan adalah sama ada terdapat sewa yang terhutang atau perlu dibayar

A atau tertunggak kepada responden-responden pada masa mereka memohon satu writ distres (lihat ms 265E, G).

(4) Perayu telah menghantar sewa untuk bulan November dan Disember 1999 kepada TTM kerana, pada masa itu, perayu tidak mempunyai apa-apa pengetahuan tentang pertukaran pemilikan
B premis tersebut. Oleh itu, perayu tiada tunggakan sewa setakat bulan November dan Disember dan responden-responden tidak boleh menggunakan persoalan ini untuk memohon writ distres terhadap perayu (lihat ms 266E–F).

(5) Dengan pemansuhan AKS, apa-apa penyewaan antara tuanpunya tanah dan penyewa hendaklah dihentikan dan sewa untuk premis
C tersebut selepas tamat tempoh transisi tersebut, iaitu 31 Disember 1999 hendaklah berdasarkan satu perjanjian penyewaan yang baru antara pihak-pihak. Dalam kes sekarang ini, sewa baru RM1,500 sebulan berkuatkuasa daripada bulan Januari 2000 telah ditetapkan di satu pihak sahaja oleh responden-
D responden dan perayu tidak mempunyai apa-apa pengetahuan mengenainya. Oleh itu, perayu tidak pernah bersetuju tentang sewa baru tersebut (lihat ms 267B–C, 268I–269A).

(6) Bagi tujuan menyokong satu tuntutan untuk kenaikan sewa atau untuk menjustifikasikan distres, responden-responden mesti
E menunjukkan bahawa perayu telah bersetuju untuk membayar sewa yang dinaikkan tersebut. Memandangkan perayu tidak bersetuju untuk membayar sewa bulanan yang dinaikkan kepada RM1,500 tersebut, tuntutan responden-responden bahawa perayu mempunyai tunggakan sewa untuk bulan Januari dan Februari 2000 mesti gagal. Oleh itu, responden-responden telah
F gagal untuk membuktikan bahawa sewa perayu tertunggak untuk empat bulan sebagaimana yang dikatakan oleh responden-responden dan atas alasan ini sahaja, writ distres yang dikeluarkan oleh mahkamah majistret adalah di luar aturan dan tidak betul dan mesti diketepikan (lihat ms 269B, F–G).

G (7) Hak tuanpunya tanah untuk mengosongkan premis tersebut menurut s 8 Akta tersebut kerana tidak membuat pembayaran atau tunggakan dalam pembayaran sewa oleh penyewa timbul hanya jika terdapat tiada pembayaran dibuat atau tunggakan pembayaran sewa oleh penyewa dalam tempoh transisi, yang bermula pada 1 September 1997 dan berakhir pada 31 Disember
H 1999. Ia tidak meliputi berlakunya sewa yang tidak dibayar atau tunggakan pembayaran sewa selepas tempoh tersebut. Hak yang diberikan kepada tuanpunya tanah menurut s 8 Akta tersebut tidak termasuk hak untuk satu writ distres. Satu tindakan untuk milikan kosong adalah berbeza daripada satu tindakan untuk writ distres. Untuk milikan kosong, penyewa perlu
I mengosongkan premis dan kemudian menyerahkan premis tersebut kepada tuanpunya tanah. Satu writ distres, sebaliknya, telah dialamatkan kepada bailif mahkamah yang mengarahkan

beliau untuk menyekat apa-apa harta alih yang ditemui atas premis atau mana-mana bahagian hartanah yang memadai, apabila dijual, untuk menrealisasikan jumlah sewa yang dinyatakan terhutang kepada pemohon, berserta dengan jumlah terhutang kepada pemohon melalui kos dan kepada bailif untuk yuran dan perbelanjaan beliau. Oleh itu, responden-responden tidak mempunyai hak untuk menggunakan s 8 Akta tersebut untuk digunakan bagi mengeluarkan writ distres terhadap perayu (lihat ms 270F–271B).

(8) Surat LCH bertarikh 1 Oktober 1999 sepatutnya hanya dihantar kepada perayu setelah tempoh transisi tamat dan bukan sebelumnya. Dalam kes sekarang ini, notis 1 Oktober 1999 telah dihantar sebelum tamat tempoh transisi dan tiada bukti bahawa notis tersebut telah disampaikan secara efektif ke atas perayu atau mana-mana ejen beliau yang diberi kuasa mengikut s 11(3) Akta tersebut. Oleh itu, notis tersebut tidak sesuai dan tidak sah (lihat ms 271E–H).

(9) Apa yang responden-responden patut buat dalam keadaan sekarang adalah untuk menggunakan haknya sebagai tuanpunya tanah premis tersebut di bawah s 11 Akta tersebut setelah tamat tempoh transisi. Responden-responden mungkin boleh menyampaikan satu notis untuk berhenti dengan memberikan perayu satu tempoh tiga bulan untuk mengosongkan premis tersebut dan setelah perayu gagal untuk mengosongkan premis sebagaimana yang diminta, responden-repsonden boleh menyaman untuk milikan kosong (lihat ms 272A–B).]

Notes

For cases on defective affidavit, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 341–354.

For cases on legislation relating to controlled premises, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 76–117.

Cases referred to

Chong Fong Kwee v Kong Gim Ham [1959] MLJ 75 (refd)
Corbett v Taylor (1864) 23 UCR 454 (refd)
Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254 (refd)
Jenaboo & Anor v Vytilingum (1885) 4 Ky 78 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Legislation referred to

Control of Rent Act 1996
Control of Rent (Repeal) Act 1997 ss 3, 5(1), 6(1), (2), 8(1), (2), 11(1), (2), (3)(a), 22(3)(a)
Courts of Judicature Act 1964 ss 29, 69(1), (4), (5)

A Distress Act 1951 ss 2, 4, 5(1)
Subordinate Courts Rules 1980 O 2 r 1, O 25 rr 22(4), (7), (8), 24, 25, Forms 71(a), (b), (c), (d)

Tan Hwee Hwee (*Shui-Tai*) for the appellant.
B *K Doraisamy* (*Loke Chew & Zainal*) for the respondents.

Ramly Ali JC: This is an appeal by the appellant/defendant against the decision of the learned magistrate, Bentong made on 2 June 2000 allowing the preliminary objections made by the respondents/plaintiffs and consequently dismissing the appellant's application dated 12 April 2000
C with costs. The appellant argued that the learned magistrate was wrong in law when he allowed the respondents' preliminary objections that the appellant's affidavits in support of the application sworn on 4 April 2000 and 8 May 2000 were defective for non-compliance with O 25 r 22(4), (7) and (8) of the Subordinate Courts Rules 1980 ('the SCR'). He further
D argued that the learned magistrate was also wrong in law in dismissing his application dated 12 April 2000 without hearing and considering its merits.

Facts of the case

E At all material times, the respondents were owners of the premises at No 100, Jalan Loke Yew, Bentong, Pahang, while the appellant was the tenant in the said premises. The appellant had rented the premises since 1947 from one Wong Sow Yoon (P) ('the deceased') for a rental of RM58 per month. In June 1995, the said premises was sold to one Tui Tuck Mun. The tenancy was continued and the same rental of RM58 was paid by the
F appellant to the said Tui Tuck Mun. Sometime in October 1999, the said premises was sold to the respondents and the appellant was advised by the said Tui Tuck Mun, vide his letter to the appellant dated 13 October 1999, to forward his monthly rental to the respondents as the new owners with effect from that month. (The appellant denied having received this letter. There's no acknowledgment of receipt produced to show that the appellant
G had received the letter).

On 1 October 1999, the first respondent (Lim Chee Hooi) claimed to have sent a letter to the appellant, giving him notice under sub-s 11(1), (2) and (3)(a) of the Control of Rent (Repeal) Act 1997 requiring the appellant to vacate the said premises on or before 31 December 1999. The letter also
H indicated that if the appellant wished to continue the tenancy of the said premises, he was advised to come to the first respondent's office to discuss the matter. The first respondent also stressed in the letter that the event the appellant continued to occupy the said premises after 31 December 1999, the appellant has to pay a rental of RM1,500 per month from 1 January 2000 until delivery of vacant possession. (Again, the appellant denied
I having received this letter. It was not sent by way of AR Registered. There is no acknowledgment of receipt produced to show that the appellant had received the letter).

On 3 December 1999, the first respondent once again sent another letter to the appellant requesting the appellant to vacate the said premises on or before 31 December 1999. Once again, the appellant was advised to discuss the matter if he wished to continue the tenancy after 31 December 1999. This is the first letter the appellant claimed to have received from the respondents.

As for the monthly rental, the appellant was paying the rental regularly to Tui Tuck Mun since July 1995 up to December 1999. For the month of January 2000, the same amount of rental was also sent to the said Tui Tuck Mun. For the months of February 2000 and March 2000, the rental was paid to the first respondent. There was no further correspondence or communication between the respondents and the appellant on this matter. On 28 February 2000 the respondents had, through their solicitors, applied for a writ of distress to be issued by the Bentong Magistrate's Court) vide Permohonan Pemula Distress No 74–01–2000 on the ground that the appellant had failed to pay the monthly rental to the said premises for four months, ie RM58 each for November 1999 and December 1999 and RM1,500 each for January 2000 and February 2000. The total amounts of rental alleged to be due and payable under the said application was RM3,116.

The said application was supported by the affidavit of the first respondent affirmed and sworn on 23 February 2000. An order allowing the application was granted by the learned magistrate on 29 February 2000 and a writ of distress was issued on 1 March 2000. Consequently, on 10 March 2000, the court bailiff seized the movable properties of the appellant in the said premises and a notice of inventory was prepared. The said properties were sold by way of public auction on 23 March 2000.

In the meantime, on 11 March 2000, the appellant lodged a police report when he discovered that the said premises was sealed and locked.

On 12 April 2000, the appellant filed an application in the Bentong Magistrate's Court to set aside and cancel the said writ of distress. This application was supported by the appellant's affidavit affirmed and sworn on 4 April 2000. When this application came up for hearing on 2 June 2000, the counsel for the respondents raised a preliminary objection to the effect that the appellant's affidavit dated 4 April 2000 was defective on the grounds that:

(i) the jurat to the said affidavit was not signed by a commissioner for oaths; and

(ii) the jurat to the said affidavit failed to comply with the requirements under O 25 r 22(7) and (8) of the SCR.

The learned magistrate allowed the said preliminary objections by the respondents' counsel and rejected the appellant's affidavit in support of the application. As the appellant's application was without any supporting affidavit, the learned magistrate consequently dismissed the application. The appellant is not satisfied with the said order. Hence the appeal.

Civil appeals to be by way of rehearing

It is trite law that all civil appeals from a subordinate court shall be by way of rehearing. This court, in exercising its appellate jurisdiction, has the power to give any judgment and to make any order which ought to have been made and to make such further or other order as the court may think fit. In other words, this court is entitled to make such order as could have been made if the case had been heard at the date on which the appeal was heard. For that purpose, this court will consider the case *in toto* (as a whole) and to make such necessary order for an early disposal of the matter.

Section 29 of the Courts of Judicature Act 1964 ('the CJA'), clearly says:

> All civil appeals from a subordinate court shall be by way of re-hearing, and the High Court shall have like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court.

In *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254, the Federal Court held (at p 256):

> Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made by the trial court and make such further or other orders as the case requires, s 69(1) and (4) of the Courts of Judicature Act No 7 of 1964. This means, on the authority of *Quilter v Mapleson* (1881–2) 9 QBD 672, that we are authorized to make such order on this appeal as ought to be made according to the law as it stands not at the time of trial but at the time of this appeal.

Section 69(1), (4) and (5) of the CJA also provides:

> (1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

Based on the above authorities, this court will rehear the whole case, including the appellant's application to set aside or to cancel the writ of distress as well as the issues on preliminary objections raised by the parties, with the view of an early disposal of the case. All the relevant affidavits and submissions by both parties are before the court. In fact both counsels for the appellant as well as the respondents have agreed and submitted that this court should rehear the whole case and to give order accordingly.

Preliminary objections

When the appellants' application came up for hearing at the magistrate's court on 2 June 2000, the counsel for the respondents raised preliminary objections to the effect that the appellant's affidavit in support of the application dated 4 April 2000 was defective on the grounds that:

(i) the jurat to the said affidavit was not signed by a commissioner for oaths; and

(ii) the jurat to the said affidavit failed to comply with the requirements under O 25 r 22(7) and (8) of the SCR in the sense that the jurat should have been as in form 71(d), not as in form 71(c).

The respondents' counsel submitted that the affidavit has no jurat at all and there is no indication to show that the affidavit was read and explained to the deponent before he signed the affidavit.

The relevant portion of the jurat to the said affidavit is reproduced below:

> [Bagi affidavit oleh seseorang yang tidak faham Bahasa Malaysia]
>
> Diikrarkan oleh,
> WONG CHOON FOR
> pada 4 APRIL 2000
> di Kuala Lumpur
>
> Saya setelah dengan sebenarnya, sejelasnya dan seterusnya membacakan kandungan afidavit di atas dan menerangkan jenis dan kesan ekshibit-ekshibit yang disebutkan didalamnya kepada deponen tersebut yang nampaknya cukup faham dengannya dan yang menurunkan tandanya pada afidavit itu didalam kehadiran saya.
>
> tt
> ... Cop
> TEONG KIAN MENG
> Jurubahasa Mahkamah Bersara
> (Tingkatan Tertinggi)
>
> Dihadapan saya,
> tt
> TEONG KIAN MENG
> Commissioner For Oaths
> Lot 138, Tingkat Satu,
> Wisma HLA, Jln Raja Chulan,
> 50200 Kuala Lumpur.

I have scrutinized the said jurat and found that the jurat was signed by the deponent Wong Choon For before a Commissioner for Oaths, Teong Kian Meng, who at the same time acted as an interpreter. The said Teong Kian Meng had signed twice in the jurat: one above his rubber stamp as 'Jurubahasa Mahkamah Bersara (Tingkatan Tertinggi)' and the other one inside his rubber stamp as a commissioner for oaths. On this finding alone, I am satisfied that the said affidavit was in accordance with the relevant requirement that a commissioner for oaths must sign the jurat. On top of that, the same Teong Kian Meng, has also signed as 'Jurubahasa Mahkamah Bersara (Tingkatan Kanan)'.

A Eventhough the relevant form 71 of the SCR, does not require the interpreter to sign the jurat, I am of the view that the presence of the said signature does not in any way cause the affidavit to be defective. It was not misleading. No one is prejudiced because of the 'extra' signature. The fact still remains that, as a commissioner for oaths, the said Teong Kian Meng has duly signed the appropriate column in the said jurat.

B The respondents' counsel also argued that the said jurat should have used form 71(d), instead of form 71(c), because the deponent in this case does not understand Bahasa Malaysia. To him, form 71(c) is not appropriate because it is meant for a deponent who is illiterate or blind.

C It is not disputed that the deponent is a Chinese who could not understand Bahasa Malaysia. The opening sentence to the said jurat clearly shows that the deponent does not understand Bahasa Malaysia. Form 71(c) is for an affidavit by an illiterate or blind person. For a better understanding of the contents of form 71(c), it is necessary to reproduce the said form:

D (c) To an affidavit by an illiterate or blind person: ... sworn (or affirmed) on the ... day of ... at ...

I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit 'and explained the nature and effect of the exhibits therein referred to') to the said deponent who seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of ...)

E Before me
Commissioner for Oaths

In the SCR, the word 'illiterate' is not defined or explained. It is therefore necessary to refer to the natural and ordinary meaning of the word as found F in the dictionary. In *Chamber Concise Dictionary*, the word 'illiterate' means 'unable to read'. While in *Collins Pocket Dictionary*, it means 'not knowing how to read or write'. In *Shorter Oxford English Dictionary*, the same word means 'one who is unable to read'. In *Oxford Advanced Learner's Dictionary*, 'illiterate' means: (1) not able to read or write; (2) ignorant in a particular field. In the context of the affidavit in Bahasa Malaysia as affirmed by the G deponent, it must mean that the deponent is unable to read or write or understand Bahasa Malaysia. Thus, the deponent in this case is said to be illiterate as far as Bahasa Malaysia is concerned. He may be literate in Chinese character, but for the purpose of the present affidavit which was affirmed in Bahasa Malaysia, the deponent must be considered as an illiterate. Therefore the proper format to be used is as in form 71(c), not as H in form 71(d) as suggested by the respondents' counsel. Since the deponent cannot understand Bahasa Malaysia, the contents of the affidavit must be interpreted to him in the language that he understands, by a competent interpreter, and thereafter, that part of the form which read: '(Through the interpretation of ...)' must be completed accordingly.

I Since the deponent is an illiterate in Bahasa Malaysia, all the requirements under O 25 r 24 of the SCR must be complied with. The said O 25 r 24 of the SCR provides:

> Where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that:
>
> (a) the affidavit was read in his presence to the deponent;
>
> (b) the deponent seemed perfectly to understand it; and
>
> (c) the deponent made his signature or a mark in his presence;
>
> the affidavit shall not be used in evidence without such a certificate unless the court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

In the present case, I am convinced that all the three requirements under O 25 r 24 of the SCR have been complied with. The commissioner for oaths who administered the oath has certified that he has truly, distinctly and audibly read over the contents of the affidavit to the deponent; and explained the nature and effect of the exhibits therein referred to; and that the deponent seemed perfectly to understand the same; and the deponent made his mark thereto in his presence.

The only 'non-compliance' in the said jurat is that the last part which states '(Through the interpretation of ...)' was not properly filled in. Instead of writing his full name after the words '(Through the interpretation of ...)' the interpreter (who was also the same person as the commissioner for oaths) had put his rubber stamp bearing his full name and the words '(Jurubahasa Mahkamah Bersara (Tingkatan Tinggi)'. Even though this does not fully comply with the format as in form 71(c), it is not to be considered as fatal because there is still some indication to show that the contents of the affidavit have been interpreted to the deponent. In any event, what is more important in affirmation of affidavits, be it by way of form 71(a), (b), (c) or (d), is that the person who administers the oaths, ie the commissioner for oaths, must be fully satisfied and certified that the deponent seemed perfectly to understand the affidavit, either through his own understandings or through the interpretation of an interpreter, and that the deponent made his signature or mark voluntarily in his presence. In the present case, the commissioner for oaths had made such certification in the jurat.

On the above justification, I am of the view that the so called 'non-compliance' with the SCR as raised by the respondents in their preliminary objection is not serious, and at most, can only be considered as a mere irregularity which can be cured and the said affidavit can be used in evidence under O 25 r 25 of the SCR to support the appellants' application. Order 2 r 1 of the SCR also provides that such non-compliance shall only be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order therein. In the premise, I have no hesitation to overrule the respondents' preliminary objection and to accept the said affidavit to be used for the purpose of the appellant's application.

Rehearing of the appellant's application

The appellant is also appealing against the decision of the learned magistrate for dismissing his application dated 12 April 2000 to set aside the

writ of distress dated 1 March 2000 and the relevant order dated 29 February 2000. The main ground for the application is that there was no rent due or payable at the material times that entitled the respondents to apply for a writ of distress, and as such, all the consequential actions as a result of the issuance of the said writ of distress are invalid. The appellant is saying that he was not in arrears with his rent at the material times.

The said writ of distress dated 1 March 2000 was issued by the magistrate's court upon an application made by the respondents under s 5(1) of the Distress Act 1951 ('the Act') which provides:

> A landlord or his agent duly authorized in writing may apply ex parte to a judge or registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the judge or registrar may make such order accordingly.

Under s 2 of the Act, the word 'judge' includes 'a first class magistrate in all cases where proceedings are taken in a magistrate's court'.

It must also be stressed here that a writ of distress can only be issued under the Act. The provisions of the relevant sections, particularly s 5 of the Act must strictly be complied with before an order can be granted. Section 4 of the Act clearly indicates that no landlord shall distrain for rent except in the manner provided by the Act. Section 5(1) of the Act clearly provides that a writ of distress can only be issued for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of tenancy immediately preceding the date of the application. In other words, there must be rent due or payable or in arrears at the time when the application was made for a writ of distress.

In the present case, the said premises was originallyunder the Control of Rent Act 1966 ('Act 363'). However, at the material time, the Act 363 was repealed by the Control of Rent (Repeal) Act 1997 ('Act 572'), which came into force on 1 September 1997. Part of the relevant transactions in this case occurred during the 'transitional period', ie the period commencing on 1 September 1997 and ending on 31 December 1999, as provided under s 5(1) of Act 572.

The main issue here is whether, in the circumstances of the present case, there was rent due or payable or in arrears to the respondents (as the landlord) at the time when they applied for a writ of distress on 28 February 2000. In his affidavit dated 23 February 2000 in support of the said application (para 3), the first respondent deposed:

> Pihak defendan adalah sebenarnya terhutang kepada plaintif dengan jumlah wang sebanyak RM3,116 yang merupakan tunggakan sewa bagi premis No 100, Jalan Loke Yew, 28700 Bentong, Pahang Darul Makmur yang kena dibayar untuk empat (4) bulan dari bulan November 1999 hingga Disember 1999 pada kadar RM58 sebulan dan Januari 2000 sehingga Februari 2000 pada kadar sebanyak RM1,500 setiap bulan.

My understanding of para 3 of the said affidavit is that the four months' rent was due (terhutang), payable (kena dibayar) and in arrears (tunggakan). A

For the months of November 1999 and December 1999 (which were still within the 'transitional period') the monthly rent was still at RM58 per month. There is no dispute on this point. The first time the appellant came to know that the said premises was sold to the respondents and all future rental was to be paid to the first respondent was when he received a letter dated 3 December 1999 from the first respondent. The said letter was originally sent to the appellant at the address of the said premises at No 100, Jalan Loke Yew, 28700 Bentong, Pahang Darul Makmur and the original date based on the postal rubber stamp is 7 January 2000. However, from the 'notis benda berdaftar', (at p 182 of the appeal records) the said letter was not served on the appellant at the above address when an attempt was made on 12 January 2000. Apparently, the letter was 'detoured' to a new address at Tkt 10, Blok 3, ISORA Apartment, Jalan Tun Razak, 50400 Kuala Lumpur. The second date based on the postal rubber stamps is 18 January 2000. Based on these dates, the court is convinced that the said letter only reached the appellant after 18 January 2000. The appellant has also denied having received both the earlier letters from the first respondent (dated 1 October 1999) and from Tui Tuck Mun (dated 13 October 1999). No proof of acknowledgment of receipt was produced by the respondent. B C D

For the months of November 1999 and December 1999 (before the appellant received the letter dated 3 December 1999 from the first respondent after 18 January 2000), the appellant had sent the rental for the two months to the previous owner, Tui Tuck Mun vide Money Order No C576599 (for November 1999) on 2 November 1999 and Money Order No C574330 (for December 1999) on 1 December 1999 (see pp 114–116 of the appeal records). At this point of time, the appellant had no knowledge about the change of ownership of the said premises as he had not received the two earlier letters sent by the first respondent and Tui Tuck Mun. A such, I am satisfied that the appellant was not in arrears as far as the rental for November 1999 and December 1999 are concerned. He had paid the rental at the beginning of each month. Thus the respondents cannot use this issue to apply for a writ of distress against the appellant. E F G

In his affidavit in support of the application for a writ of distress (at para 3), the respondents alleged that the appellant was in arrears (tunggakan) for rental for the months of November 1999 to February 2000. The meaning of the word 'arrears' was considered in a Canadian case: *Corbett v Taylor* (1864) 23 UCR 454. That case dealt with a contract of requiring payment of monies. In that case, the court said: H

> We take arrears to mean something which is behind in payment or which remains unpaid ... It implies a duty and a default

In *Chong Fong Kwee v Kong Gim Ham* [1959] MLJ 75, Rigby J has said that 'rent is lawfully due as soon as the proper date for payment has arrived ... Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before such date. I

Applying the above principle to the present case, I am satisfied that the rental for November 1999 and December 1999 was not due and not in arrears because the appellant had tendered the said rental to the previous owner of the premises, Tui Tuck Mun, before being effectively informed about the new owners.

For the months of January 2000 and February 2000, it is not disputed that the 'transitional period' as provided under s 5(1) of Act 572 had lapsed, after 31 December 1999. Upon the repeal of Act 363, any tenancy between a landlord and a tenant shall be deemed to have ceased, (see s 3 Act 572). The amount of rental to be paid monthly by the tenant to the landlord during the 'transitional period' shall be determined in accordance with the formula in the schedule. However, in the present case, both parties chose to stick to the original rental of RM58 per month until the end of the 'transitional period', on 31 December 1999. In other words, after 31 December 1999, the rate of rental for the said premises should be based on a fresh tenancy agreement between the parties. The premises is no more protected under the Act 363. Being a fresh tenancy agreement, there must be elements of 'offer' and 'acceptance' as to the new rate of rental and other related issues.

In the present case, the first respondent had, through his letters to the appellant (dated 3 December 1999) requested the appellant to vacate the said premises on or before 31 December 1999. The letter further indicated that if the appellant wishes to continue the tenancy, he is advised to come to the first respondent's office to discuss the matter. The said letter dated 3 December 1999 is reproduced below:

Lim Chee Hoi,
No 84, Tingkat 3,
Jalan Loke Yew,
28700 Bentong,
Pahang Darul Makmur.

Date: 3 Disember 1999

Wong Choon For
No 100, Jalan Loke Yew,
28700 Bentong,
Pahang Darul Makmur

Tuan/Puan,

Notis untuk mengosongkan premis No 100, Jalan Loke Yew, 28700 Bentong, Pahang Darul Makmur

Merujuk kepada perkara diatas dan keratan 'CONTROL ACT' yang dilampirkan bersama, pihak tuan perlu mengosongkon premis tersebut sebelum atau pada 31 Disember 1999.

Sekiranya pihak tuan berminat untuk terus menyewa premis di atas, sila datang ke pejabat saya untuk berbincang.

Sekian, harap maklum.

Yang benar,
Sgd

In his earlier letter to the appellant dated 1 October 1999, the first respondent had given the same indication. However, the appellant in his affidavit had denied having received this letter. The respondents had not given any answer or explaination about this matter in their affidavit in reply. It is trite law that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as on admission by him of the fact so asserted (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). In that letter, the respondent had also indicated that if the appellant continues to occupy the said premises after 31 December 1999, the appellant is required to pay a rental of RM1,500 per month with effect from January 2000 until he delivers vacant possession to the respondents. That is the only occasion where the rental of RM1,500 was mentioned by the respondents. Even that, there is no indication that the matter was effectively communicated to the appellant. In his letter dated 3 December 1999 which was received by the appellant, the first respondent had not made any mention about the new rental of RM1,500 per month with effect from January 2000. The said letter dated 1 October 1999 is reproduced below:

> Lim Chee Hoi,
> No 84, Tingkat 3,
> Jalan Loke Yew,
> 28700 Bentong,
> Pahang Darul Makmur.
>
> Tarikh: 1 Oktober 1999
>
> Wong Choon For
> No 100, Jalan Loke Yew,
> 28700 Bentong.
> Pahang Darul Makmur
>
> Tuan/Puan,
>
> *Kenaikan sewa rumah (kedai) mengikut Akta Kawalan Sewa (Pemansuhan) 1997, notis untuk mengosongkan premis No 100, Jalan Loke Yew, 38700 Bentong, Pahang Darul Makmur*
>
> Merujuk kepada perkara di atas dan keratan 'CONTROL ACT' yang dilampirkan bersama.
>
> Saya dengan ini ingin memberi notis kepada pihak tuan mengikut s 11(1), (2), (3)(a) Akta Kawalan Sewa (Pemansuhan) 1997 untuk mengosongkon premis tersebut pada atau sebelum 31 Disember 1999. Sekiranya pihak tuan berminat untuk terus menyewa premis diatas, sila datang ke pejabat saya untuk berbincang. Jika pihak tuan terus menetap di bangunan itu selepas 31 Disember 1999, maka pihak tuan dikehendaki membayar sewa bulanan sebanyak RM1,500 mulai Januari 2000 sehingga milikan kosong.
>
> Sekian, harap maklum.
>
> Yang benar,
>
> Sgd

In the circumstances, it is obvious that the new rental of RM1,500 per month with effect from January 2000 was unilaterally fixed by the

respondents (as the landlord). It was not even effectively communicated to the appellant. The appellant had no knowledge about it. Thus, the appellant had never agreed to the said new rental. In fact, the appellant had not been to the first respondent's office to discuss about the new rental as required by the first respondent vide his letter dated 3 December 1999 to the appellant. Therefore, I can safely conclude that there is no new tenancy agreement. In order to support a claim for such increased rental or to justify the distress therefor, the respondents must show that the tenant (the appellant) had agreed to pay such increased rental or facts from which such assent on the part of the appellant might be inferred by the court.

In *Jenaboo & Anor v Vytilingum* (1885) 4 Ky 78, Wood J in dealing with the issue of increased rental to justify the issue of a writ of distress, has said:

> ... that there was no power in a landlord to increase his tenant's rent by a notice, and unless there was an agreement by the tenant to pay such increased rent, or there were such facts in the case, as by his conduct or otherwise, from which the court could infer an assent on his part, he could not be made liable therefor; that if a landlord considered he should get more rent and the tenant declined to pay it, the only remedy open to the landlord was, after giving the tenant a proper notice to quit, to sue him in action of ejectment; but he had no right to distrain for his increased rent. That to entitle a landlord to destrain there must be an agreement to pay rent, and that for a fixed and definite amount.'

In that case, the distress was declared to be irregular and improper and was discharged on the ground that the rent at RM5 per month was not agreed to and the amount of the rent that should be paid per month was a matter in dispute between the landlord and the tenant.

In the present case, applying the principles established in *Jenaboo*'s case, I have no hesitation to conclude that the respondents' claim that the appellant was in arrears in respect of rental for January 2000 and February 2000 must fail. Therefore, the respondents had not proved that the appellant's rental was in arrears for four months as alleged by the respondents. On that ground, there is no justification for the application and issuance of a writ of distress by the Bentong Magistrate's Court. On this ground alone, the court is satisfied that the said writ of distress issued on 1 March 2000 was irregular and improper and must be set aside.

The respondents' counsel relied heavily on the provisions of Act 572, particularly ss 8 and 11 thereof, to authorize their application for a writ of distress. The counsel argued that s 8 of Act 572 empowers the respondents to apply for a writ of distress for non-payment or arrears in payment of rental of the said premises, after complying with the necessary procedures laid down in s 11(2) and (3) of Act 572. In fact, the earlier letter dated 1 October 1999 sent by the first respondent to the appellant (which was not received by the appellant) clearly stated that the said letter was a notice issued pursuant to s 11(1), (2), and 22(3)(a) of Act 572.

Section 8(1) and (2) of Act 572 provides:

> (1) In the event of non-payment or arrears in payment of rental by the tenant during the transitional period, the landlord shall have the right to vacant

possession of the premises from the tenant without payment of any compensation. A

(2) In exercising his right to vacant possession of premises under sub-s (1), the landlord shall comply with the procedure laid down in sub-s 11(2) and 11(3) for the recovery of vacant possession of premises.

Section 11(1), (2) and (3) of Act 572 provides: B

(1) Upon the expiry of the transitional period under sub-s 5(1) or 5(2), as the case may be, all tenancies deemed to have been entered into between the landlords and tenants under sub-s 6(1) shall cease to be in force and the landlords shall thereafter:

(a) have the right to vacant possession of the premises from the tenants without payment of any compensation; and C

(b) be entitled to any rental accrued and remaining unpaid from the tenants as at the date of the expiry of the transitional period.

(2) A landlord who wishes to exercise his right under para (l)(a) shall serve on the tenant a notice to vacate the premises.

(3) The notice referred to in sub-s (2): D

(a) shall provide for a period of three months for the tenant to vacate the premises; and

(b) may be served on the tenant or anyone authorized to accept service on his behalf, hereafter referred to as the 'person to be served':

(i) by delivering it personally to the person to be served; E

(ii) by sending it by registered post addressed to the person to be served at the usual or last known place of residence of the person; or

(iii) by affixing it on some conspicuous part of the premises to which it relates if the person to be served cannot be served personally or by registered post. F

With respect, I cannot agree with the submission of the respondents' counsel on this issue. In the first place, the landlord's right under s 8 of Act 572 only arises in the event of non-payment or arrears in payment of rental by the tenant during the transitional period, ie 1 September 1997 to 31 December 1999. It does not cover arrears of rental beyond that period. G The landlord must prove that there was non payment or arrears in payment of rental during the transitional period. In other words, in relation to the present case, it should only cover rental for the months of November 1999 and December 1999, but not for the months of January 2000, and February 2000. These two months are clearly beyond the transitional period, as H prescribed under s 5 or the Act. As I have stated earlier, there was no non-payment or arrears in payment of rental by the appellant for the months of November 1999 and December 1999.

Secondly, the right conferred under s 8 only refers to the right to vacant possession of the premises from the tenant (appellant) without payment of any compensation. It does not include the right for a writ of distress (as in I the present case). One can easily appreciate that an action for vacant possession is totally different from an action for a writ of distress. For vacant

possession, the tenant has to vacate the said premises and thereafter to hand over the said premises to the landlord. On the other hand, a writ of distress has no such effect. A writ of distress is addressed to the bailiff of the court directing him forthwith to destrain any movable property found on the premises named therein or such part of the property as may be sufficient, when sold, to realize the amount of rent therein stated to be due to the applicant, together with such sum due to the applicant by way of costs and to the bailiff for his fees and expenses (see s 7 of Act 572). Therefore, the respondents are not entitled to use s 8 as authority to authorize the issuance of a writ of distress against the appellant in the present case.

Thirdly, in exercising his right under s 8(1) of Act 572, the landlord shall or must comply with the procedure laid down in s 11(2) and (3) of Act 572. This is provided under s 8(2). The right under s 11(1) of the Act only arises 'upon the expiry of the transitional period', ie after 31 December 1999, but not before. Again, the right under s 11(1) refers to the right to vacant possession of the premises from the tenant without payment of any compensation and to any rental accrued and remaining unpaid from the tenant as at the date of the expiry of the transitional period. In the present case, I have stated earlier that the appellant was not in arrears of rental for the months of November 1999 and December 1999, as claimed by the respondents. Also, the respondents were not claiming for vacant possession through their application in the magistrate's court. Therefore, I am of the view that the right under s 11(1) of Act 572 is not applicable in the present case.

The respondents' counsel argued that the first respondent had served on the appellant a notice dated 1 October 1999 as required under s 11(2) and (3) of Act 572. Again, I am of the view that the said notice only relates to a notice to vacate the premises, but not to apply for a writ of distress. The said notice, giving the tenant a period of three months to vacate the premises, shall only be sent to the tenant 'upon expiry of the transitional period', ie after 31 December 1999, but not before. As required under s 11(3), the said notice must be served on the tenant or any one authorized to accept service on his behalf, either by delivering it personally to him; by sending it by registered post addressed to him at his usual or last known place of residence; or if the person to be served cannot be served personally or by registered post, by affixing it on some conspicuous part of the said premises.

In the present case, the said notice (dated 1 October 1999) was sent before the expiry of the transitional period. There is no proof that the notice was effectively served on the appellant or any of his authorized agents in accordance with the provisions of s 11(3) of Act 572. Therefore, the said notice is not appropriate and invalid.

In the present case, the appellant was occupying the said premises at the material times. However, due to his old age and sickness, the appellant has to go to Kuala Lumpur very often for treatment. Therefore, the tenancy is deemed continued even after the date of the repeal of Act 363 (see s 6(1) of Act 572). Section 6(2) of Act 572 also provides:

> Unless sooner terminated by mutual consent of the parties, a tenancy deemed to have been entered into under sub-s (1) shall be in force until the expiry of the transitional period.

What the respondents should have done in the present circumstances of the case was to exercise their right as the landlords to the said premises under s 11 of Act 572, upon the expiry of the transitional period, ie after 31 December 1999, when the tenancy deemed to have been entered into under s 6(1) of the Act, ceases to have effect under s 6(2). The respondents may serve a notice to quit, giving the appellant a period of three months to vacate the premises, and upon the appellant's failure to vacate the premises as requested, the respondents may sue for vacant possession and arrears of rental.

Conclusion

In the circumstances, based on the aforesaid grounds, I make an order in terms of the appellant's application dated 12 April 2000 whereby the earlier order of the learned Bentong Magistrate made on 29 February 2000 and the writ of distress issued on 1 March 2000, be set aside. The respondents are to pay damages to the appellant as a result of the execution of the said writ of distress, to be assessed by the SAR; as well as costs of this proceeding.

Appellant's appeal allowed.

Reported by Lim Lee Na